IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	Nos. 62317-6-I
	)	62319-2-I
Respondent, Cross-Appellant,	)	(Consolidated Cases)
	)	
v.	)	DIVISION ONE
	)	
DONALYDIA HUERTAS,	)	Unpublished Opinion
	)	
Appellant, Cross-Respondent.	)	FILED: July 27, 2009
	)	

Lau, J.—Seventeen-year-old Donalydia Huertas purchased a controlled substance and gave some of it to her friend, Danielle McCarthy, who ingested it and became extremely ill. Huertas refused to obtain medical aid, and McCarthy died. Huertas appeals her jury convictions for controlled substances homicide, second degree manslaughter, and the manifest injustice disposition. She contends that (1) the court violated her speedy trial right, (2) the manslaughter jury instruction was erroneous because no duty exists to summon aid, (3) double jeopardy bars her manslaughter conviction, and (4) insufficient evidence exists to support her controlled substance homicide conviction. Finding no error, we affirm the convictions. And because the

court properly relied on two statutory aggravating factors and the sentence was not clearly excessive, we affirm the manifest injustice disposition.

FACTS

On December 31, 2006, Donalydia Huertas, Danielle McCarthy, and Kelsey Kertson got together at Huertas's house. Meanwhile, David Morris, Jordan Paris, Gary Jones, and Kyle Gossler met at their friend, Ryan Mills', house in Edmonds. The boys decided to take some methylenedioxymethamphetamine (MDMA or "Ecstasy"). Morris agreed to buy some Ecstasy pills and later sell them to his friends.

Jones called Huertas and invited her to join them. Jones, Paris, and Morris drove in two vehicles to pick up the girls and take them to Edmonds. Huertas and McCarthy rode with Morris. On the way, the girls discussed using Ecstasy. Huertas had used Ecstasy before, but McCarthy had not. Huertas told McCarthy that the drug "makes you feel good" and that she would "have a good time on it." 5 Report of Proceedings (RP) (June 16, 2008) at 599. McCarthy decided she wanted to try it, but she had no money and Huertas did. Morris sold two pills to Huertas for $20. Huertas ingested one pill and gave the second one to McCarthy, who ingested it.

They arrived at Mills' house at about 11 p.m. During the party, Huertas asked Morris to sell her two more Ecstasy pills. Morris asked Huertas if the pills were going to anyone else. Huertas said the pills were just for her, so he sold her two more pills for $20. Huertas ingested one and gave the other to McCarthy, who ingested it. About 30 minutes later, the group left to attend a fraternity party near the University of Washington.

McCarthy became extremely ill.

She could not stand unassisted and vomited and urinated on herself. When Kertson and Paris tried to help McCarthy, Huertas denied that McCarthy had taken any drugs and angrily told them, "Get the fuck away." 3 RP (June 11, 2008) at 157. Someone put McCarthy in a car. McCarthy told Huertas, "Please don't tell my mom. Please don't let me die." 3 RP (June 11, 2008) at 158. Huertas laughed and said, "I won't, baby girl. You're not going to die." 3 RP (June 11, 2008) at 159. When Paris and Morris suggested that McCarthy needed to go to a hospital, Huertas insisted that McCarthy just needed to lie down. While the others attended the fraternity party, Huertas stayed outside with McCarthy.

The group eventually returned to Mills' house in Edmonds. Some boys carried McCarthy in, put her on the couch, and gave her blankets and a bowl to vomit in. When Kertson again asked Huertas if McCarthy had taken anything, Huertas said, "Fuck no. Stop asking me. You're fucking annoying." 3 RP (June 11, 2008) at 165–66. Kertson also suggested taking McCarthy back to Huertas's house, but Huertas said, "Fuck no. I'm not taking her back to my house like this." 3 RP (June 11, 2008) at 165–66. Kertson testified that everyone thought McCarthy was just drunk and needed to sleep it off. At around 3:30 or 4:00 a.m., McCarthy appeared to have a seizure. Paris and Morris again suggested taking her to the hospital, but Huertas insisted that it was not necessary. Everyone went to sleep.

At about 7 a.m., Kertson woke up and told Huertas that they needed to leave and needed to take McCarthy home. When Kertson suggested that Jones could probably take them, Huertas replied, "Well, why don't you go suck Gary's dick and maybe he'll do it." 3 RP (June 11, 2008)

at 168. Kertson then tried unsuccessfully to wake McCarthy up. McCarthy's skin was cold and pale. They also tried but failed to revive her by putting her in a warm bath. Morris and Huertas then decided to take McCarthy to Stevens Hospital. When they arrived at 9:45 a.m., McCarthy was dead.

On May 18, 2007, Huertas was charged as a juvenile with controlled substances homicide.[1] She was arraigned in Snohomish County Juvenile Court on June 1, 2007. There was no request for a declination hearing, and the case was retained in juvenile court. On July 12, 2007, the court continued fact-finding hearing to October 2, 2007, and jurisdiction was extended through December 31, 2007.

On September 18, 2007, the State filed a new information in adult court to add a first degree manslaughter charge. That charge resulted in an automatic decline of juvenile jurisdiction and transfer to adult court for trial under RCW 13.04.030. Over Huertas's objection, the court dismissed her juvenile case without prejudice. She was rearraigned in adult court on September 24, 2007. The court also denied Huertas's motion to dismiss based on denial of speedy trial rights.

On June 19, 2008, a jury found Huertas guilty of controlled substances homicide and the lesser degree offense of second degree manslaughter. The adult court remanded the case to juvenile court for further proceedings. After a declination hearing, juvenile court retained jurisdiction.

The standard range for Huertas's offenses was 0 to 30 days. Her probation counselor sought a manifest injustice disposition. After a disposition hearing, the court

[1] RCW 69.50.415.

committed Huertas to a juvenile institution until age 21. Huertas appealed.[2]

ANALYSIS

Time for Trial

Huertas first argues that the manslaughter conviction must be reversed because her trial was untimely. She argues that where multiple charges arise from the same criminal conduct, the speedy trial clock for the second criminal charge starts running when the defendant is arraigned on the first charge. She further contends that the controlled substances homicide and first degree manslaughter charges are "related offenses" because they are based on the same conduct. Therefore, computation of time for trial on one charge applies equally to the other charge. JuCR 7.9(a); CrR 4.3.1. Huertas was arraigned in juvenile court on the controlled substances homicide charge on June 1, 2007, and rearraigned in adult court on both the controlled substances homicide charge and the first degree manslaughter charge on September 27, 2007. Since all information supporting both charges was available prior to May 31, 2007, and Huertas was out of custody, she asserts that the State had 90 days to bring her to trial in adult court from June 1, 2007. CrR 3.3. Because this did not happen, she contends that the manslaughter conviction must be reversed and dismissed.

Huertas relies on case law that is no longer applicable. Prior to 2003, the time-

[2] Huertas also moved for release pending appeal. A commissioner of this court ruled that her motion would also be treated as a RAP 18.13 motion for accelerated review. The commissioner then denied Huertas's motion for release pending appeal, referred her motion for accelerated review to this panel of judges, and set an expedited briefing schedule. Huertas's appeal was set for oral argument on the next available calendar. A Washington Supreme Court commissioner denied Huertas's motion for discretionary review of the commissioner's ruling.

for-trial rules did not contain any requirements for trial on related charges. Therefore, courts relied on American Bar Association standards for supplemental interpretation. These standards recommended "that the time within which trial must be held should begin on all crimes 'based on the same conduct or arising from the same criminal incident' from the time defendant is held to answer any charge with respect to that conduct or episode." State v. Peterson, 90 Wn.2d 423, 431, 585 P.2d 66 (1978) (quoting CrR 4.3(c)).

But under the 2003 amendments, the rules now specifically address the time for trial on related charges. CrR 3.3(a)(4) now provides,

> The allowable time for trial shall be computed in accordance with this rule. If a trial was timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

The purpose of these revisions was to "'cover[ ] the necessary range of time-for-trial issues, so that additional provisions do not need to be read in.'" State v. George, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007) (quoting Wash. Courts Time-for-Trial Task Force, Final Report II.B at 12–13 (Oct. 2002))

CrR 3.3(a)(5) provides, "The computation of the allowable time for trial of a pending charge shall apply equally to all related charges." CrR 3.3(a)(3)(i) defines "pending charge" as "the charge for which the allowable time for trial is being computed," and CrR 3.3(a)(3)(ii) defines "related charge" as "a charge based on the same conduct as the pending charge that is ultimately filed in the superior court." Here, the charges of manslaughter and controlled substances homicide are "related," so computation of the time for trial on one

charge applies equally to the other charge. Under CrR 3.3(e)(7), all proceedings in juvenile court are excluded in computing the time for trial. Accordingly, all of the time elapsed before arraignment on the manslaughter charge is excluded. Huertas's trial was timely.

Manslaughter Instruction

Next, Huertas argues that the court erred by instructing on manslaughter based on failure to summon aid. This court reviews the adequacy of jury instructions based on an error of law de novo. State v. Clausing, 147 Wn.2d 620, 626–27, 56 P.3d 550 (2002).

The challenged instruction states,

> 1. That on or about the 31st day of December 2006 through the 1st day of January 2007, the defendant delivered a controlled substance to and failed to summon aid for Danielle McCarthy;
> 2. That defendant's conduct was criminal negligence;
> 3. That Danielle McCarthy died as a result of the defendant's acts; and
> 4. That the acts occurred in the State of Washington.

The State argues that a manslaughter conviction can be based on failure to summon aid, where the defendant created the risk of injury. In State v. Morgan, 86 Wn. App. 74, 936 P.2d 20 (1997), the defendant was convicted of first degree manslaughter for causing the death of his wife by cocaine overdose. There was evidence that he injected her with the drug, and he admitted that he did not summon aid when she became ill. The court held that the defendant had a duty to summon medical aid based

on both his status as the victim's husband and his act of placing her at risk of injury.

> In addition, California has found that a duty to summon medical aid exists if a person creates or increases the risk of injury to another. People v. Oliver, 210 Cal. App. 3d 138, 258 Cal. Rptr. 138, 143 (1989). In Oliver, the court upheld a manslaughter conviction for a defendant who took her extremely intoxicated ex-husband home, helped him use heroin, dragged him behind her house after finding him unconscious and allowed him to die without medical assistance. The court found the defendant's behavior created an unreasonable risk of harm and a duty to prevent that risk from occurring by summoning aid. Her failure to summon any medical assistance breached that duty and made her responsible for his death. Id. at 144 . . . .
>
> Here, Mr. Morgan had a statutory duty to provide medical care, a natural duty to provide medical help to his wife, and a duty to summon aid for someone he helped place in danger. His violation of this duty amounted to recklessness and was sufficient basis for the manslaughter charge.

Morgan, 86 Wn. App. at 80–81 (emphasis added).

Unlike the defendant in Morgan, Huertas had no statutory or familial duty to summon aid for McCarthy. But the Morgan court also based its holding on a third independent basis—the duty to act based on creation of the peril. Huertas created the risk of injury by giving McCarthy a potentially dangerous controlled substance. And she drastically increased that risk by failing to obtain medical care—and affirmatively discouraged others from doing so—when McCarthy became ill.[3]

Huertas relies on State v. Jackson, 137 Wn.2d 712, 976 P.2d 1229 (1999). In Jackson, a three-year-old girl died of blunt force injuries and both foster parents were

[3] Generally, there is no legal duty to aid another person in danger. One well established exception to this rule, however, is the duty to act based upon creation of the peril. See, e.g., 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.3(a)(5) (1986); United States v. Hatatley, 130 F.3d 1399, 1406 (10th Cir. (1997) (duty to aid person who defendant beat and left by roadside); Commonwealth v. Levesque, 536 Mass. 443, 450, 766 N.E.2d 60 (2002) ("[w]here a defendant's failure to exercise reasonable care to prevent the risk he created is reckless and results in death, the defendant can be convicted of involuntary manslaughter").

charged with murder. The trial court instructed the jury that either defendant could be an accomplice to the murder if he or she failed to come to the aid of the child. Jackson, 137 Wn.2d at 720–21. The court acknowledged that parents have a duty to protect their children. Jackson, 137 Wn.2d at 721. But because "it is beyond argument that a parent or foster parent's failure to come to the aid of his or her child is not a crime unless the failure falls within the reach of a criminal statute," the court examined Washington's accomplice liability statute to determine whether a parent's failure to protect his or her child from abuse subjects that person to accomplice liability. Jackson, 137 Wn.2d at 721. The court held that the accomplice liability instruction was improper because the statute does not extend accomplice liability based on failure to aid. Jackson, 137 Wn.2d at 722–24.

Jackson is distinguishable. Under the theory rejected in Jackson, accomplice liability would attach based on failure to aid even if the defendant did not act to place the victim in danger. But under Morgan, a defendant can be guilty of manslaughter based on failure to obtain aid for a person that she placed in danger. We conclude that the manslaughter instruction was proper.

Double Jeopardy

Huertas also argues that the double jeopardy clause requires reversal of her conviction for second degree manslaughter. A double jeopardy claim is a question of law reviewed de novo. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

"'Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the

same offense.'" State v. Kier, 164 Wn.2d 798, 803–04, 194 P.3d 212 (2008) (quoting Freeman, 153 Wn.2d at 771). In determining legislative intent, the court examines three factors.

> We first consider express or implicit legislative intent based on the criminal statutes involved. If the legislative intent is unclear, we may then turn to the "same evidence" Blockburger [v. United States, 284 U.S. 299, 525 S. Ct. 180, 76 L. Ed. 2d 306 (1932)] test, which asks if the crimes are the same in law and in fact. Third, if applicable, the merger doctrine may help determine legislative intent, where the degree of one offense is elevated by conduct constituting a separate offense. We have also recognized that, even if two convictions would appear to merge on an abstract level under this analysis, they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each.

Kier, 164 Wn.2d at 804 (citations omitted).

Huertas argues that because the manslaughter jury instructions incorporated the controlled substances homicide elements, only the latter charge can stand. She further argues that her conduct demonstrated no independent purpose to support a conviction on both offenses. The State counters that Huertas was properly convicted of both crimes because there is no showing of legislative intent to preclude multiple punishments.

The legislative intent supports the State's position. Because there is no express statutory provision addressing cumulative punishment for manslaughter and controlled substances homicide, we consider the same evidence rule. "Under the same evidence rule, if each offense contains elements not contained in the other offense, the offenses are different and multiple convictions can stand." State v. Jackman, 156 Wn.2d 736, 747, 132 P.3d 136 (2006). Here, the crime of second degree manslaughter includes an

element of criminal negligence, which is not an element of controlled substances homicide. RCW 9A.32.070(1). And controlled substances homicide includes an element that the defendant unlawfully delivered a controlled substance that was used by the recipient, resulting in her death. RCW 69.50.415(1). Thus, the crimes are not the same under the same evidence test.[4]

Once the court determines that two crimes do not require the "same evidence," a presumption exists that they are not the same, which "should be overcome only by clear evidence of contrary intent." State v. Calle, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). Huertas fails to overcome that presumption. Controlled substances homicide is not included within the definition of "homicide" in the criminal code. RCW 9A.32.010. Rather, it is codified under the Uniform Controlled Substances Act, chapter 69.50 RCW. Furthermore, manslaughter is classified as a violent offense, whereas controlled substances homicide is a nonviolent drug offense. RCW 9.94A.030(24), (33), (54)(a)(iv).

Finally, Huertas's invocation of the merger doctrine is inapplicable. It applies "where the degree of one offense is elevated by conduct constituting a separate offense." Kier, 164 Wn.2d at 804. The crime of controlled substances homicide does not have different degrees, and the degree of manslaughter depends on the defendant's mental state, not on any fact relating to delivery of a controlled substance. In sum, the double jeopardy clause does not require reversal of Huertas's second

[4] Huertas's reliance on the language of the jury instructions rather than the statutory language is misplaced because the touchstone of this analysis is legislative intent.

degree manslaughter conviction.

Controlled Substances Homicide Statute

Huertas argues that insufficient evidence exists to support her conviction for controlled substances homicide because the statute was not intended to address the situation where two people jointly purchase drugs from a dealer and then one hands the drug to the other. Although Huertas frames the issue as a challenge to the sufficiency of the evidence, it hinges on statutory interpretation. Therefore, de novo is the appropriate standard of review. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The controlled substances homicide statute provides, "A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(2)(a), (b), or (c) which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, is guilty of controlled substances homicide." RCW 69.50.415(1). "In interpreting the Uniform [Controlled Substances] Act, we strive to ascertain and carry out the legislative intent. The statutory definition of a term controls its interpretation." State v. Morris, 77 Wn. App. 948, 950, 896 P.2d 81 (1995) (footnotes omitted). Under the rule of lenity, statutory ambiguities are resolved in favor of the defendant. In re Charles, 135 Wn.2d 239, 250, 955 P.2d 798 (1998).

"Deliver" or "delivery" is defined as "the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship." RCW 69.50.101(f). And the ordinary meaning of "transfer" is "'to cause to pass from one person or thing to another.'" State v.

Martinez, 123 Wn. App. 841, 846–47, 99 P.3d 418 (2004) (quoting State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990)). In two sales transactions, Morris handed the drugs to Huertas after she paid him with her own money. Huertas later handed some of those drugs to McCarthy. These acts satisfied the statutory definition of "delivery." Moreover, even if we assume that McCarthy and Huertas jointly purchased the drugs in the first transaction, there is no evidence that McCarthy was a joint purchaser in the second transaction.

Huertas relies on Morris. There, the court held that a person who purchased a controlled substance was not guilty of delivery. Morris, 77 Wn. App. at 950. But here, Huertas purchased the drugs and then gave some to McCarthy. We conclude that the evidence is sufficient to support Huertas's conviction for controlled substances homicide.

Huertas also argues that the controlled substances homicide statute is unconstitutionally vague as applied.

> "'Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed", or (2) the statute "does not provide ascertainable standards of guilt to protect against arbitrary enforcement."'"

State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007) (quoting State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)). "[A] statute or condition is presumed to be constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt." State v. Smith, 130 Wn. App. 721, 726–27, 123 P.3d 896 (2005).

Huertas contends that no one would expect to be prosecuted for controlled substances homicide where two

individuals purchase drugs together and one hands the drug to the other. On both occasions, Huertas took physical possession of the drugs from Morris and gave some to McCarthy. An ordinary person could understand that this was a "transfer" that constituted a proscribed "delivery."

Manifest Injustice Disposition

Huertas challenges the court's manifest injustice disposition imposing a sentence of commitment until age 21. "A juvenile court may impose a sentence outside the standard range if it determines that a sentence within the standard range would 'effectuate a manifest injustice.'"[5] State v. Duncan, 90 Wn. App. 808, 812, 960 P.2d 941 (1998) (quoting RCW 13.40.160(1)).

> In reviewing a manifest injustice determination, we engage in a three-part test: "(1) Are the reasons given by the trial court supported by substantial evidence; (2) do those reasons support the determination of a manifest injustice disposition beyond a reasonable doubt; and (3) is the disposition clearly too excessive or too lenient?"

Duncan, 90 Wn. App. at 812; RCW 13.40.230(2).

Are the reasons supported by substantial evidence? Huertas argues that the court's stated reasons for imposing a manifest injustice disposition are not supported by substantial evidence. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." State v. Meade, 129 Wn. App. 918, 922, 120 P.3d 975 (2005).

RCW 13.40.150(3)(i) provides a list of nonexclusive aggravating factors that the

[5] "'Manifest injustice' means a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of [the Juvenile Justice Act]." RCW 13.40.020(17).

court may consider in deciding whether to enter a manifest injustice disposition. Here, the sentencing court found the following statutory aggravating factors.[6]

> (i) In the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another;
> (ii) The offense was committed in an especially heinous, cruel, or depraved manner;
> (iii) The victim or victims were particularly vulnerable;
> . . . .
> (vi) The respondent was the leader of a criminal enterprise involving several persons;
> . . . .

RCW 13.40.150(i).

Huertas argues that infliction of serious bodily injury was not a valid basis for the manifest injustice disposition. "The court may not rely on factors necessarily considered by the legislature in defining the standard range, or which inhere in the charged crime." State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003). The State concedes that infliction of bodily injury inheres in the charged crimes. Therefore, it cannot be a basis for the manifest injustice disposition.

Huertas next argues that there is insufficient evidence to support a finding that she acted in a heinous, cruel, or depraved manner because she did not engage in intentionally gratuitous conduct. See, e.g., State v. Ogden, 102 Wn. App. 357, 7 P.3d 839 (2000) (substantial evidence to support finding that crime was committed in heinous, cruel, or depraved manner where offender beat and stabbed homeless victim to death, then carved incision on his eyelid). Huertas also points to the declination hearing, where the court found that the offense was not "committed in an aggressive,

[6] The disposition order shows no nonstatutory aggravating factors.

violent or premeditated manner" and that she did not intend to cause McCarthy's death. RP (Aug. 13, 2008) at 143.

Although Huertas's behavior may not have been violent or premeditated, there is ample evidence that she exhibited a pattern of extreme indifference to McCarthy's apparent suffering over an extended period of time. She laughed when McCarthy said, "Please don't let me die." 3 RP (June 11, 2008) at 158. She refused to take McCarthy back to her house, saying, "Fuck no. I'm not taking her back to my house like this." 3 RP (June 11, 2008) at 165–66. When others expressed concern about McCarthy's condition, Huertas angrily denied that McCarthy had taken drugs. And Huertas repeatedly discouraged others from obtaining medical care for McCarthy, despite her obvious severe illness. This behavior was cruel, heinous, and depraved in a manner that went beyond the typical actions that constitute controlled substances homicide or second degree manslaughter. The court did not err in entering this finding.

Huertas next argues that McCarthy was not particularly vulnerable because she voluntarily ingested drugs, just as many other young people do. "'Where all victims of a specific offense are equally vulnerable, an aggravating factor cannot be found.'" State v. Collicutt, 118 Wn.2d 649, 659, 827 P.2d 263 (1992) (quoting David Boerner, Sentencing in Washington, at 9-13 to 9-15 (1985)). She therefore contends that vulnerability is inherent in the crime. Relating to controlled substances homicide, the State concedes that there is no evidence that Huertas knew about McCarthy's particular vulnerability to Ecstasy.

But Huertas was also convicted of second degree manslaughter. "A person is guilty of manslaughter in the second

degree when, with criminal negligence, he causes the death of another person." RCW 9A.32.070(1).

> [F]actors inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature and do not distinguish the defendant's behavior from that inherent in all crimes of that type—may not be relied upon to justify an exceptional sentence, whereas factors not inherent in the crime may justify a sentence enhancement even where the trial court relied on them in establishing the elements of the particular crime.

State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (citing David Boerner, Sentencing in Washington § 9.6 (1985)). Victim vulnerability is not a factor necessarily considered by the Legislature in setting the standard sentence range for second degree manslaughter.

"[P]articular vulnerability 'connotes some disability due to age or a physical or mental condition which renders the victim helpless, defenseless, or unable to resist.'" State v. Payne, 58 Wn. App. 215, 220, 795 P.2d 134 (1990) (quoting State v. Wall, 46 Wn. App. 218, 222, 729 P.2d 656 (1986)). The only person who knew that McCarthy had consumed two Ecstasy pills was Huertas. And after the drug took effect, McCarthy was incapacitated, unable to obtain medical care, and completely dependent on others. At that point, McCarthy was much more vulnerable than other people who take drugs without becoming ill. The court did not err in entering this finding.

Huertas next argues that there is no evidence she was the "leader of a criminal enterprise involving several persons."[7] She analogizes to RCW 9A.82.060, the leading organized crime statute, which requires that no fewer than three people act with the

[7] There are no reported decisions construing this provision and no statutory definition of the term "criminal enterprise."

same criminal intent. The State argues that McCarthy's care was a criminal enterprise because Huertas took on a leadership role in the criminally negligent failure to summon aid.

We conclude that the court erred in entering this finding. There is no evidence that more than one person acted with the same criminal intent. Only two people—Huertas and Morris—were charged in McCarthy's death. Witness testimony indicated that Huertas acted independently to keep information about McCarthy's drug use from others and to deflect suggestions that she needed medical care. Although the record shows that the other partygoers deferred to Huertas regarding McCarthy's care, there is no evidence that anyone other than Morris knew that McCarthy had taken Ecstasy or that anyone other than Huertas affirmatively discouraged them from seeking medical care for her.

Because two of the four statutory grounds relied on by the sentencing court are improper, we next consider whether reversal is required. A remand for resentencing may be necessary where the court "placed 'significant weight' on the inappropriate factors in departing from a standard range disposition." State v. Bourgeois, 72 Wn. App. 650, 664, 866 P.2d 43 (1994). But a disposition will be affirmed if the appellate court can "determine that the trial court would have entered the same sentence on the basis for the remaining valid aggravating factors." State v. S.S., 67 Wn. App. 800, 818, 840 P.2d 891 (1992).

Here, the court did not make an explicit finding that any one of its reasons would support the disposition. It did, however, state in its oral ruling that "there have been any number of decisions along the way in

this case that have been less than clear-cut and difficult for this court, but I would say that this is not one of them." RP (Aug. 25, 2008) at 38. And there is nothing in the record that shows the court placed significant weight on the two improper factors. We conclude that the court would have imposed the same sentence even in the absence of those factors.

Do the reasons support the determination? Huertas argues that the court's reasons did not support the manifest injustice disposition beyond a reasonable doubt because it failed to find explicitly that a standard range disposition would impose a danger to society. She relies on language stating, "A manifest injustice disposition must rest on a finding that a standard range disposition 'for this offense and this defendant' presents a danger to society." State v. Tai N., 127 Wn. App. 733, 744, 113 P.3d 19 (2005) (quoting State v. Rhodes, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979)). But in Tai N., we did not hold that the court must make an explicit "danger to society" finding.[8] Rather, we concluded that the court "did not identify any pertinent aspects of Tai's circumstances . . . that might have shown that imposing the standard range disposition on him would endanger society." Tai N., 127 Wn. App. at 745.

Huertas next argues that the court's reasons do not support the disposition because at the declination hearing two weeks earlier, the court stated, "in terms of protection of the public as far as danger of recidivism, I believe a danger of recidivism would be extremely low with this particular type of offense and this particular respondent." RP (Aug. 13, 2008) at 145. But declination hearings and disposition

[8] We note that Huertas cites no cases reversing a manifest injustice disposition where the court found one or more statutory aggravating factors.

hearings serve different purposes and are evaluated under different standards. Huertas cannot rely on the court's ruling in one proceeding to undermine its ruling in the other.[9]

Was the disposition clearly excessive? Huertas argues that the disposition of commitment until age 21 should be reversed as clearly excessive. "While there [are] no specific criteria for choosing the length of a disposition, a manifest injustice disposition is clearly excessive 'only when it is not justified by any reasonable view of the record.'" State v. Moro, 117 Wn. App. 913, 923, 73 P.3d 1029 (2003) (quoting State v. S.H., 75 Wn. App. 1, 13, 877 P.2d 205 (1994)). "[D]issatisfaction with the standard range is not a proper justification for an exceptional sentence." S.S., 67 Wn. App. at 814.

Huertas contends that the court's primary reason for incarcerating her until age 21 was its dissatisfaction with the standard range sentence of 0 to 30 days, particularly in comparison with the longer sentence imposed on Morris in adult court. She further argues that the disposition was excessive because she complied with treatment directives and because, at the time of sentencing in August 2008, her counselor's opinion was that she needed only 6 to 12 additional months of treatment.

Although the court commented on the disparity between Huertas's juvenile sentence and Morris's adult sentence, the record amply supports the length of the

[9] Huertas further argues that the court improperly relied on RCW 13.40.150(3)(i)(viii), which provides as an aggravating factor, "the standard range disposition is clearly too lenient considering the seriousness of the juvenile's prior adjudications." Because Huertas had no prior adjudications, we agree that this factor is inapplicable. But the court did not rely on it.

disposition.[10] "In disposition hearings all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible in a hearing on the information." RCW 13.40.150(1). "[RCW 13.40.230] authorizes review of the whole record, including the trial court's oral ruling." State v. E.J.H., 65 Wn. App. 771, 775, 830 P.2d 375 (1992).

At the dispositional hearing, the court acknowledged some progress by Huertas, but stated that she must be "held fairly and equitably accountable for her criminal conduct during that evening." RP (Aug. 25, 2008) at 41. Evidence in the record shows that she failed to take full responsibility for her role in McCarthy's death. Huertas professed her lack of culpability to McCarthy's family, asserting that they were wrong to blame her. She also wrote e-mails and postings asserting that she had done everything she could to help McCarthy.[11] And Huertas's school counselor Scott Lundberg wrote in July 2008 of "the injustice, as Dona [Huertas] described it, of the public response to both her and the deceased."

The record also supports a need for continued treatment. Internet postings

[10] The record before the sentencing court included printouts of postings from myspace.com, Huertas's drug and alcohol treatment reports, letters from her counselor and two teachers, her probation counselor's decline of jurisdiction, and manifest injustice reports.

[11] On October 4, 2007, Huertas posted the following comments on myspace.com. "you don't listen do you. i told you i helped her. and i didn't party that night. you know why? cause i was helping danielle puke out of a car. me and david stayed with her that night. so you know what. stop asking me questions about that night cause no matter what I tell you your just gunna be like why didn't you do this and that. . . . you and your family have put me through hell. . . ."

show that while charges were pending, Huertas continued to use drugs and alcohol and that she was only participating in treatment "so it looks good for court."[12] Only five months after McCarthy died, Huertas wrote with amusement about taking care of another young girl who was seriously ill from alcohol. The record shows that in July 2007, Huertas was alcohol dependent with moderately high levels of severity regarding motivation, recovery potential, and quality of recovery environment and a moderate risk for reoffense without a treatment intervention. She relapsed while in intensive outpatient treatment and had to enter inpatient treatment. Huertas also attempted suicide in August 2007 and suffered from anxiety and depression. In August 2008, her counselor stated that she needed up to a year of continued treatment. Although Huertas completed drug and alcohol treatment in January 2008, these factors show that she would benefit from the structured environment of a juvenile institution.

In sum, we conclude that the manifest injustice disposition was proper and not clearly excessive.

Right to Jury Trial

Huertas finally argues that entry of the manifest injustice disposition violated her right to a jury trial because the State did not plead and the jury did not find aggravating factors. "'[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403

[12] On June 4, 2007, in response to a friend who asked why she would be gone, Huertas wrote on myspace.com, "lol im goin to in patient. so it looks good for court. cause its saying im changing around my life. stop drinking and stuff."

(2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Blakely clarified that the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303 (emphasis added).

Huertas acknowledges that Blakely does not extend to juveniles adjudicated in juvenile proceedings, including the sentencing stage. Meade, 129 Wn. App. at 925. She contends, however, that Blakely applies because she was adjudicated by jury trial in adult court. Huertas was sentenced following a disposition hearing in juvenile court, where the right to jury trial does not attach.

In sum, we uphold Huertas's convictions and the manifest injustice disposition. We affirm.[13]

WE CONCUR:

[13] In a cross-appeal, the State argues that if this court determines that there was no basis for a manifest injustice disposition, then the court abused its discretion in relying on the availability of such a disposition as a basis for retaining jurisdiction. Because we uphold the manifest injustice disposition, we need not reach this issue.